15308

No. ~~15708~~

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

MARGUERITE MAY DONALDSON
and ELMIRA DONALDSON LUCKER,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF FOR APPELLEE

JOHN F. DORE
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THE BALLARD NEWS, SEATTLE, WASHINGTON — 3/2/57 — 50 COPIES

No. 15398

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COUNTER STATEMENT OF FACTS

The statement of facts contained in the Brief for Appellant fails to include an important fact. Following the rediagnosis of the deceased insured veteran,

Allen Perry Donaldson, as having the fatal Hodgkins Disease in 1948, the deceased insured veteran, in the company of his father, William Nelson Donaldson, went to the offices of the Veterans' Administration in Seattle, King County, Washington. There they talked to an official about the possibility of the veteran's making application for waiver of premium, by reason of total disability, based upon the rediagnosis. There, the official advised them at that time that the waiver period had expired. They accepted the advice of the official. (R. 67).

SUMMARY OF ARGUMENT

(A)

One question is posited on this appeal, and that is whether the evidence supported the findings. To state the matter negatively is to say, "does the evidence preponderate against the findings of the District Court"?

While an abbreviated record is to be encouraged under prevailing rules of civil procedure, appellant must designate enough of the record of evidence to enable the Court of Appeal to make a determination. Where the points on appeal turn solely on whether the evidence was sufficient to support the findings of the District Court, nothing less than a complete statement

of the record of evidence could enable the Court of Appeal to review the question.

And that is not done here. Appellant has extracted only portions of the testimony of the witnesses named; and appellant has totally failed to designate the testimony of other witnesses unnamed in the abbreviated record brought to this court. Unless the evidence preponderates against the findings, the findings of the District Court should be sustained. All of the evidence is not here.

(B)

Allen Perry Donaldson, the deceased insured veteran, failed to file timely application for waiver of premiums, due to circumstances beyond his control. The circumstance was total ignorance of his fatal malady. And the circumstance of ignorance was solely and directly caused by an erroneous diagnosis of his military superiors, to whom he not only owed a duty of obedience, but in whom he had the profoundest confidence. He actually had the fatal and dreaded Hodgkins disease, but they certified that he did not. In fact, they discharged him as physically fit, save for defective vision and teeth. He was misled, and in being misled by his duly constituteed superiors, he was justifiably ignorant of the true facts of his fatal and pernicious condition. He was, indeed, deprived of a free

and intelligent choice. The question posited before the Court, therefore is in fact this: Would the insured veteran have applied for a waiver of premiums (to which he was entitled), had he been advised of the true facts of his condition?

(C)

As to the award of attorneys fees to Plaintiffs' Counsel, that is a matter residing within the inherent judicial powers of the District Court.

(D)

The denial of a new trial was not error, because the motion was addressed to the discretion of the court. Unless the record discloses evidence demonstrating that the court abused its discretion, the denial of a new trial to appellant was not error.

ARGUMENT

I

Appellant's first specification of error urged on appeal is substantially this: that the evidence does not support the findings of the District Court. Appellant's first point, therefore attacks Finding of Fact Number VII (R. 27). It is a fundamental of appellate practice that the findings of the trial court will not

be disturbed, unless the evidence preponderates against them.

Here, the Appellant has not brought sufficient of the record to this Court to enable a review of questions of evidence, because the record is not complete. The full and complete testimony of Doctor Q. B. DeMarsh is absent from this record, as is the full and complete testimony of William Nelson Donaldson, and Elmira Donaldson Lucker. (R. 53, 59, 75). Mrs. Marguerite May Donaldson's testimony is also abbreviated. (R. 52). Another witness, a former employer of the deceased, insured, veteran, is completely absent. It is clear from the record that the trial court put considerable weight on the expert testimony of Dr. Q. B. DeMarsh, (R. 81); and all of Dr. DeMarsh's testimony is not in this record of evidence.

Certainly an abbreviated record is to be encouraged, for reasons too obvious to spell out here. *Rule 75(d), Federal Rules of Civil Procedure.* Nevertheless, the appellant must designate sufficient portions of the record to enable the court to make a full and accurate review. *Blake* v. *Trainer*, 148 F. (2d) 10, (1945), 79 U.S. App. D.C. 360.

And where, as here, the question on appeal turns upon the sufficiency of the evidence to support the findings of the trial court, the burden rests upon appellant

to bring before the appellate court a complete statement of the evidence upon which the findings of the trial court were based. Nothing less than a complete statement of the evidence entitles appellant to have a review of the question of whether the findings were erroneous. See: *Zander* v. *Lutheran Brotherhood of Minneapolis, Minnesota.* 137 F. (2d) 17, (C.A. 8), (1943).

II

Actually, the sole question before the trier of fact was whether the deceased, insured veteran would have applied for a waiver of premiums, (to which he was entitled), had he known that he had the dreaded Hodgkins disease in 1945, when he was discharged from service. In other words, did the fact that he was misled by an erroneous diagnosis of his military superiors, deprive him of a free and intelligent choice. He was ignorant of his actual condition; and his ignorance was due to error in diagnosis. He was not only misled to believe he did not have Hodgkins disease, but, he was discharged as physically fit.

Under proviso three of *802 (n), 38 U.S.C.A.* the insured veteran is excused from the requirement of making timely application for waiver of premiums, where the failure is due to "circumstances beyond his control". In *Kershner* v. *United States*, 215 F. (2d)

737, (C.A. 9), (1954), the Court has ruled that ignorance may constitute a circumstance beyond the control of the insured. And where such ignorance is caused directly and proximately by an erroneous diagnosis, certainly it is a circumstance beyond his control. The fact that the deceased insured was misled, deprived him of a "free and intelligent choice".

Because the veteran had Hodgkins disease upon his discharge in September of 1945, he was entitled to a waiver of premiums on his policy as of that time. The evidence that he was discharged as physically fit indicates that he was misled as to his true condition, and all of the rights, including waiver of premiums pertinent thereunto. Certainly had the deceased insured known the true facts, he would have applied for waiver of premiums in September 1945. In *Kershner* v. *United States, (supra)*, the Court of Appeals for the Ninth Circuit said this:

> "If, absent a showing that the service man positively did not want insurance, it will be presumed he did want it".

III

Let us now regard the judicial authorities governing injustices as they have developed within the realm of National Service Life Insurance. There is now a line of cases which adhere to the view that the lan-

guage of the *National Service Life Insurance Act, Section 602(n), 38 U.S.C.A. 802(n),* and provision three thereof, conveys a congressional intent to cover cases where the insured veteran was deprived of a chance to make a FREE AND INTELLIGENT CHOICE. *Kershner* v. *United States, (supra); United States* v. *Meyers,* 213 F. (2d), 223, (C.A. 8), (1954); and *Landsman* v. *United States,* 205 F. (2d) 18, (C.A. D.C.), (1953); certiorari denied, 346 U. S. 876.

Briefly abstracted the *Kershner case* concerns a deceased insured veteran who was discharged from active naval service on March 14, 1946. Premiums were paid on his NSLI policy to April 10, 1946. By March 10, 1946 he was totally disabled, and he died on November 16, 1949, from Leukemia. He neither had paid premiums, nor had he applied for waiver thereof. Was his failure to apply for a waiver of premiums due to "circumstances beyond his control"? The Court held it was. Reasoning that the language of the statute was to be given a "liberal construction", (citing *Landsman* v. *United States, supra),* the Court ruled that the veteran was denied a FREE AND INTELLIGENT CHOICE. Why? Because he was in fact totally disabled, and the Veterans' Administration forewent telling him the true facts, (for merciful reasons). In developing what it meant by a "free and intelligent choice", the Court said this:

". . . to give relief where one as a rule may assume that the veteran was hampered in making a choice, or prevented from doing so".

Moreover, the Kershner case restated the philosophy governing the liberal interpretation given to proviso three of *38 U.S.C.A. 802(n)*, which is this:

". . . a further reason for the generosity in favor of the veteran is the beneficient approach in recent years of the whole government to the veteran. It has been that of the patron who says, "put yourself in my hands. Don't worry. I'll take care of you. Only after the veteran or his beneficiary has waked up in an administrative cul de sac, is it ever indicated to the veteran that a little independent advice might have been a good thing. Such is not the atmosphere in which a policy is bought from a private company."

Secondly, the *Landsman case (supra)*, which reversed the District Court, and ruled that a war veteran's ignorance of the existence of an injury or disease, from which he suffers, may constitute a "circumstance beyond his control", providing that the ignorance is, in fact, beyond his control. Parenthetically, would not the fact that a veteran was misled, not only by his military superiors, but by a Veterans' Administration official, constitute a "circumstance beyond his control"? It is interesting to note that in the *Landsman case* the insured veteran suffered from Hodgkins disease, a pernicious malady which inevitably results in death.

Thirdly, the *Meyers case* wherein the insured veteran was discharged on December 31, 1945, his policy lapsing the following month. The government officers failed to notify the serviceman of his total disability at the time of discharge. Here, the Court apparently reasoned that this led the veteran not to apply for continuance or reinstatement of his policy. The Court ruled that the failure of governmental officers to inform the serviceman of total disability at the time of his separation constituted a "circumstance beyond his control".

Certainly, the real question which underlies all of the legal propositions posed to this Honorable Court is this: Was the insured entitled to waiver of premiums when discharged in September, 1945; and was his failure to apply thereafter due to circumstances beyond his control? That is to say, would this veteran have made timely application for waiver of premiums had he been advised by the military, that he actually was suffering from a pernicious and fatal disease?

The fact that the deceased insured veteran did not make an application for waiver after 1948, was adequately dealt with by the Trial Court who said " . . . but the Court's further finding that the fact that he was found to have Hodgkins disease in 1948

did not in and of itself make this insured aware of the fact that he may have been continuously and totally disabled at the time of his discharge, or lapse of his insurance, because he was discharged after medical examination by the Navy as being fit and he in his own mind may have therefore believed he was not totally disabled, whereas, in fact he was". (R. 80). In addition, when the veteran and his father did go to the regional Veterans Administration Office, he was advised he had no rights in connection with the policy at that time. (R. 67).

IV

As to Appellant's Motion for New Trial, the Denial thereof, was not error. The refusal to hear additional evidence proferred after trial is not error, where such evidence is (1) argumentative; (2) stale; and (3) known to movants before or during trial. Federal Rules of Civil Procedure, 59(b); *Buder* v. *Fiske*, (C.A. 8, 1949) 174 F. (2d) 260; *Champion Spark Plug Co.* v. *Sanders*, (D.C. N.Y. 1945) 63 F. Supp. 345. And especially so, where the lack of diligence appears affirmatively from the Affidavit of Movant. (R. 40).

CONCLUSION

Review of Appellant's brief reveals a complete lack of modern authority for the prepositions advanced therein. Appellant takes issue with the Kershner case, and even urges the Court to reconsider its decision therein. Appellant further relies on authority divorced from the field of National Service Life Insurance, and accordingly divorced from all of the facts and conditions on connection therewith. No authority cited by appellant detracts in any way from the position of the Appellee in this appeal.

Appellee therefore prays that the Judgment of the District Court be affirmed.

Respectfully submitted,

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